



UNITED STATES SENATE
**REPUBLICAN
POLICY COMMITTEE**

Larry E. Craig, Chairman
Jade West, Staff Director

April 25, 2002

The Left's Iron-Clad Litmus Test on Abortion

Justice White Could Not Be Confirmed Today

Last Friday in Denver, friends and admirers of former Supreme Court Justice Byron R. White paid their last respects. At the memorial service, one of his friends quoted Hamlet's tribute to his dead father, "He was a man, take him all in all / I shall not look upon his like again." Justice White's eulogist may have said more than he knew.

Byron White led a truly remarkable – even heroic – life. Potter Stewart, who served with White on the Supreme Court, said that Byron White was both Clark Kent *and* Superman. But a distinguished and accomplished American such as Byron White could *not* today be confirmed to the Supreme Court because he does not pass the Left's iron-clad litmus test on abortion.

Byron White had humble beginnings in Colorado, but he became a Rhodes Scholar and an honor graduate of Yale who paid his way through law school by playing professional football. At the time, he was the highest-paid player in the league, at \$15,000, and the league-leading rusher.

After Pearl Harbor, White enlisted in the Navy and served in the Pacific as an intelligence officer. (He wrote the intelligence report on the sinking of *PT 109*, which had been commanded by John F. Kennedy.) White served aboard the carriers *Bunker Hill* and *Enterprise* in the Battle of Okinawa. During the kamikaze attacks that disabled both carriers and killed and wounded hundreds, Byron White distinguished himself by his bravery.

After the War, White completed law school and clerked for the Chief Justice of the United States, Fred Vinson. He then practiced law in Denver. In 1960, he ran Citizens for Kennedy, and after the election he became the Deputy Attorney General under **Robert Kennedy**, where he played a key role in the civil rights struggles in the South. In 1962, **President John F. Kennedy** nominated Byron White to the Supreme Court.

Byron White was confirmed *twelve days after his nomination* by voice vote of a Democrat-controlled Senate. He was confirmed *on the same day as his hearing*. That confirmation hearing lasted 90 minutes, with the vast majority of time taken up by the American Bar Association and the Colorado Bar Association. The nominee himself was in the witness chair for *eleven minutes*.

When a Senator asked the nominee to comment on the charge that the Supreme Court was legislating, Byron White said, “I think it is clear under the Constitution that legislative power is not vested in the Supreme Court. It is vested in the Congress; and I feel the major instrument for changing the laws in this country is the Congress of the United States. The business of the Congress is that of changing the law.”

Byron White was a Democrat. He was nominated by a highly popular Democratic President. He was confirmed unanimously by a Democrat-controlled Senate, just days after his nomination was first made and just hours after he appeared at his confirmation hearing.

When he announced his retirement 31 years later, **then-President Clinton** said that Justice Byron White had “served his country and our Constitution well,” and that all Americans were “fortunate that he devoted the great portion of his life to public service.” **Senator Joseph Biden**, who then was the Chairman of the Senate Judiciary Committee, said, “Byron White truly embodies the American dream. . . . [I]n a professional career that culminated in more than three decades as a guiding force on the United States Supreme Court, Justice White demonstrated an uncompromising integrity.”

When Justice White died on April 15, 2002, **Senator Edward Kennedy** called White “the best America had to offer,” and went on to say, “Justice White served the nation with great distinction, a deep passion for the law and a commitment to excellence.” **Former President Bill Clinton** issued a statement saying that White “led a truly remarkable life and served on the Court as he lived – with distinction, intelligence and honor.”

That same Byron White, an American hero who was elevated by a Democratic President and praised for decades by Democratic officials, could no longer qualify for appointment to the Supreme Court, or possibly to any Federal court, because of his *legal* views on abortion. He said in his judicial opinions that he could find nothing in the text, structure, or history of the U.S. Constitution that authorized courts to remove from legislatures the power to regulate elective abortions. Indeed, he called the Court’s decisions in the abortion cases “an exercise of raw judicial power.”

This point has not escaped the notice of editorial writers. On April 17, the *Tampa Tribune* opined that if Justice White were “nominated to the high court today, it is altogether doubtful he would make it out of the Senate Judiciary Committee, much less win nomination,” and *USA Today* said, “The same qualities that made him a memorable jurist would make him a lightning rod for fierce opposition if he were named to the Supreme Court now.”

Do we want a system of selecting judges that excludes a man like Byron White? The Left does, yes, but do most Americans?